

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 20, 2006 Session

MYRA (GASS) KELLER v. MAX KEITH GASS

Appeal from the Circuit Court for Greene County
No. 03CV845 Ben K. Wexler, Judge

No. E2006-00190-COA-R3-CV - FILED OCTOBER 4, 2006

Myra Beatrice Gass (“Wife”) filed a complaint seeking a divorce from Max Keith Gass (“Husband”). The parties reached a mediated settlement agreement which, among other things, required Wife to rollover \$15,425 in her 401K account to Husband’s retirement plan. The mediated settlement agreement was approved and adopted by the Trial Court. The problem arose when Wife attempted to rollover her 401K as she then was informed by her employer, the State of Tennessee, that applicable state law prevented the State from rolling over her 401K into Husband’s account. Husband filed a motion for contempt, claiming Wife was in contempt for failing to rollover her 401K into his account. Following a hearing, the Trial Court did not find Wife in contempt, but did enter a judgment against Wife for \$15,425. Wife appeals. We vacate the \$15,425 judgment entered against Wife and modify the Trial Court’s order.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit
Court Vacated in Part and Modified; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Edward Kershaw, Greeneville, Tennessee, for the Appellant, Myra (Gass) Keller.

Denise Terry Stapleton, Morristown, Tennessee, for the Appellee Max Keith Gass.

OPINION

Background

In September of 2003, Wife filed a complaint seeking a divorce from Husband after thirty-two years of marriage. When the complaint was filed, Husband was sixty-one years old and was receiving social security disability benefits in the amount of \$998.00 per month, and retirement benefits totaling \$580.03 per month. Wife was fifty years of age when the complaint was filed and was employed by the State of Tennessee.

The divorce proceedings were referred to a mediator, and in August of 2004, the parties reached a mediated settlement agreement. A Final Divorce Decree was entered by the Trial Court on October 4, 2004, which incorporated and restated the terms of the mediated settlement agreement. As relevant to this appeal, the Final Divorce Decree provided that Wife would “roll her 401K over into a retirement plan that belongs to [Husband]. This shall be done in such a manner that no tax consequences affect [Wife].” The value of Wife’s 401K at that time was \$15,425.00. The final decree also required Wife to pay Husband \$200 per month for thirty-six months for Husband to obtain “health care coverage.” Wife agreed to execute any necessary documentation so that Husband could obtain COBRA benefits through Wife’s employer.

In August of 2005, Husband filed a motion for contempt. Husband claimed Wife was in contempt for failing to pay him the \$200 per month towards health insurance. According to Husband, Wife had made only one payment of \$200 before ceasing the payments altogether. Husband also claimed Wife was in contempt for failing to rollover her 401K into Husband’s retirement account.

Wife responded to the motion for contempt, claiming it was clearly intended that the \$200 was to be used by Husband for health insurance payments. Wife added that Husband never obtained any health insurance coverage following the divorce, thus obviating the need for the \$200 monthly payment. With regard to Wife not having rolled her 401K into Husband’s retirement plan, Wife claimed she took the necessary steps to have these retirement benefits rolled over, but the State of Tennessee prohibited her from rolling over her 401K into Husband’s retirement account. Wife later filed an amended response to the motion for contempt, claiming that pursuant to Tenn. R. Civ. P. 60.02, the entire divorce decree should be set aside due to Wife’s inability to comply with the terms of the mediated settlement agreement.

A hearing on the motion for contempt was conducted in December of 2005. The proof at the hearing was such that it is undisputed that Wife attempted to have her 401K rolled over, but the State of Tennessee would not allow her to do so. Husband testified that he was on medicare/medicaid at a monthly cost of “somewhere less than \$100.” Wife testified that she could afford to pay Husband the \$200 per month for health care coverage, but she did not have the available funds to pay Husband \$15,425.

Following the hearing, the Trial Court entered an order which provides, in relevant part, as follows:

1. [Husband] is hereby granted a money judgment in the amount of fifteen thousand four hundred twenty-five dollars (\$15,425.00) against [Wife] with said funds representing [Husband's] share of [Wife's] 401K plan.¹

2. [Wife] is further ordered to pay to [Husband] the sum of two hundred dollars (\$200.00) per month for a total of thirty-five (35) months with said payment commencing immediately upon entry of this Order. This payment represents the sum which was awarded to [Husband] in the Final Divorce Decree for health care coverage premiums for which [Husband] is justly entitled. [Husband] is not required to provide proof of insurance to [Wife]....

4. [Wife's] request to set aside the Judgment if the [Court] were to modify the same is denied.

Wife was not found to be in contempt of court.

Wife appeals claiming the Trial Court erred when it unilaterally modified a provision of the mediated settlement agreement "over the objection of one of the parties, [when] the modification was detrimental to the non-consenting party."

Discussion

The underlying facts in this appeal are undisputed. The issue of whether the Trial Court had authority to modify or improperly modified the terms of the parties' mediated settlement agreement presents a question of law. Our review of legal issues is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Although the present case involves a mediated settlement agreement, there is no reason to treat that settlement agreement any different from a marital dissolution agreement. Under Tennessee law, a marital dissolution agreement is simply a contract between two spouses contemplating a divorce. *See Stone v. Stone*, No. M1997-00218-COA-R3-CV, 2000 WL 1679434 (Tenn. Ct. App. Nov. 9, 2000), *no appl. perm. appeal filed*; *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). Once a marital dissolution agreement is approved by a trial court and

¹ Following the December 2005 hearing, the Trial Court orally announced its judgment and stated that Wife would be required to pay a judgment of \$15,425, plus any appreciation that occurred in the 401K following entry of the final decree. However, the order that was entered following the hearing references only the \$15,425 judgment.

incorporated into a final decree, the classification and division of marital property is not subject to later modification. See *Johnson v. Johnson*, 37 S.W.3d 892, 895 (Tenn. 2001)(“[C]ourt orders distributing marital property are not subject to modification.”); *Stone*, 2000 WL 1679434, at * 3 n.5 (citing *Towner v. Towner*, 858 S.W.2d 888, 892 (Tenn. 1992)).

Husband argues that because the State was prohibited by statute from distributing Wife’s pension to Husband, “[c]ounsel for [Wife] knew or should have known that due to this provision of the law, it would be impossible for [Wife] to transfer her 401K to [Husband].” Husband claims that because Wife’s counsel knew or should have known of this statutory provision, Wife cannot claim it was impossible for her to comply with the parties’ original agreement. Thus, according to Husband, the Trial Court correctly entered a judgment for Husband in the amount of \$15,425.00. While Husband’s argument may have some appeal at first glance, Husband offers absolutely no explanation as to why he and his attorney should not be charged with the same knowledge of the applicable statute.

Wife argues that the entry of the judgment against her for \$15,425 is quite different from what she agreed to in the mediated settlement agreement. The original agreement awarded Husband money that was already in the bank, so to speak. Wife was not required to make any monetary payments to Husband from current resources as a result of Husband being awarded that particular item of marital property. With the Trial Court’s subsequent order, however, Wife is now required to make payments to Husband or otherwise come up with \$15,425. We agree with Wife and conclude that the Trial Court’s order granting Husband a judgment for \$15,425 was a modification of the marital property settlement contained in the final decree and the Trial Court could not make that modification over the objection of either party.

The more difficult issue is how to remedy the problem presented in this case without improperly modifying the property settlement or vacating that settlement altogether and having the parties start back at square one. The mediated settlement agreement required Wife to rollover her 401K to Husband with no tax consequences to Wife. No specific time frame for the rollover was set forth. We believe the appropriate way to solve the dilemma in this case is to give effect to the clear intent of the parties as stated in the mediated settlement agreement itself. To this end, we order the following:

1. Upon Wife attaining the age of 59½, Wife is to rollover her 401K, plus any appreciation, to Husband if the plan and applicable law allow her to do so at that time.²
2. If the plan or applicable law prohibits Wife from rolling over her 401K to Husband when Wife reaches the age of 59½, then upon attaining the age of 59½, Wife is to withdraw the entire

² According to the record, once Wife attains the age of 59½, she will be able to access the funds in her 401K account.

amount of the 401K, plus any appreciation. Wife is to pay income taxes due on the entire amount withdrawn from the funds withdrawn. All remaining funds are then to be paid directly to Husband.³

3. Wife is to designate Husband as the primary beneficiary and his estate as the secondary beneficiary of her 401K plan. This will ensure that Husband receives these funds if Wife dies before she reaches the age of 59½. This also will ensure that if Husband dies before Wife reaches the age of 59½, then the proceeds from Wife's 401k plan will be paid to Husband's estate.

The portion of the judgment of the Trial Court awarding Husband a monetary judgment against Wife for \$15,425 is vacated and the judgment is modified as ordered by this Court. All remaining aspects of the Trial Court's judgment are affirmed.

In light of our holding, we pretermitt Wife's issue pertaining to whether the Trial Court had authority to enter a judgment against Wife for \$15,425 when all that had been filed by Husband was a motion for contempt.

Conclusion

The portion of the judgment of the Trial Court awarding Husband a judgment against Wife for \$15,425 is vacated. The Trial Court's judgment is modified to reflect the following obligation on the part of Wife:

1. Upon Wife attaining the age of 59½, Wife is to rollover her 401K, plus any appreciation, to Husband if the plan allow her to do so at that time.

2. If the plan or applicable law prohibits Wife from rolling over her 401K to Husband when Wife reaches the age of 59½, then upon attaining the age of 59½, Wife is to withdraw the entire amount of the 401K, plus any appreciation. Wife is to pay income taxes due on the entire amount withdrawn from the funds withdrawn. All remaining funds are then to be paid directly to Husband.

³ By allowing Wife to use the 401K funds to pay any taxes resulting from the withdrawal of those funds, Wife will not have any negative tax consequences as originally agreed to by the parties. Further, this is in complete compliance with the language of the mediated settlement agreement as it provided for no set time for the transfer to occur. As the plan or applicable law prohibits such agreed upon transfer until a particular event, such as Wife attaining age 59½, occurs, our order simply requires that this transfer be made, as agreed to by the parties, as soon as allowed by the plan and applicable law.

3. Wife is to designate Husband as the primary beneficiary and his estate as the secondary beneficiary of her 401K plan. This will ensure that Husband receives these funds if Wife dies before she reaches the age of 59½. This also will ensure that if Husband dies before Wife reaches the age of 59½, then the proceeds from Wife's 401k plan will be paid to Husband's estate.

This cause is remanded to the Trial Court for collection of the costs below. Exercising our discretion, costs on appeal are assessed one-half to the Appellant, Myra (Gass) Keller, and her surety, and one-half to the Appellee, Max Keith Gass.

D. MICHAEL SWINEY, JUDGE